No. 08-5721
Title: Steven Spears, Petitioner
v.
United States
Docketed: August 12, 2008
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (05-4468, 06-1354)
Decision Date: June 23, 2008
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 12 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 11, 2008)
Aug 15 2008	Waiver of right of respondent United States to respond filed.
Aug 21 2008	DISTRIBUTED for Conference of September 29, 2008.
Aug 27 2008	Response Requested . (Due September 26, 2008)
Sep 17 2008	Order extending time to file response to petition to and including October 27, 2008.
Oct 27 2008	Brief of respondent United States in opposition filed.
Nov 6 2008	DISTRIBUTED for Conference of November 25, 2008.
Nov 6 2008	Reply of petitioner Steven Spears filed. (Distributed)
Dec 1 2008	DISTRIBUTED for Conference of December 5, 2008.
Dec 8 2008	DISTRIBUTED for Conference of December 12, 2008.
Jan 5 2009	DISTRIBUTED for Conference of January 9, 2009.
Jan 12 2009	DISTRIBUTED for Conference of January 16, 2009.
Jan 21 2009	Petition GRANTED the motion of petitioner for leave to proceed in forma pauperis is granted. The judgment of the Court of Appeals is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion. Justice Kennedy would grant the petition for a writ of certiorari and set the case for oral argument. The Chief Justice filed a dissenting opinion in which Justice Alito joins. Justice Thomas dissents. Opinion per curiam. (Detached Opinion)
Feb 23 2009	Judgment Issued

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(2)

No. 08-5721

ORIGINAL

In The
Supreme Court of the United States

STEVEN SPEARS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

FILED
AUG 12 2008
OFFICE OF THE CLERK

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. May a district court categorically reject the sentencing guideline for crack cocaine as too harsh?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Steven Spears respectfully prays that a writ of certiorari issue pursuant to 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on June 23, 2008, a split en banc opinion reversing the judgment of the district court.

OPINIONS BELOW

The opinion of the court of appeals is currently reported at ___F.3d___, 2008 WL 2485329 and is reproduced at App. 1.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution and 18 U.S.C. § 3553(a), each of which is reproduced at App. 3.

STATEMENT OF THE CASE

This case presents an unusual procedural history, and would come before this Court for a second time. The case was initially heard on appeal in 2006 by a panel of the Eighth Circuit consisting of Judges Bye, Lay, and Riley. After argument, it appears that Judges Bye and Lay were in favor of affirming the district court's sentence. However, no panel opinion was issued; rather an *en banc* opinion written by Judge Riley (the apparent dissenter on the original panel) was issued, over the dissent of Judges Lay and Bye, reversing the district court and remanding for resentencing. Briefing and argument *en banc* were not conducted. Mr. Spears' subsequent petition for certiorari was granted and the Eighth Circuit's decision was vacated and remanded after this Court's ruling in *Kimbrough v. United States*, 128 S. Ct. 558 (2007). On remand, the *en banc* Eighth Circuit again reversed and remanded for resentencing on a 6-5 vote, holding that a district court may not categorically reject the sentencing guideline for crack cocaine as too harsh. Mr. Spears now seeks certiorari review of that decision.

The issue in this case arose at sentencing. On September 20, 2005, a jury convicted Steven Spears of conspiracy to distribute 1,792 grams of crack cocaine and 500 grams of powder cocaine. At sentencing, the district court properly

calculated the sentencing guidelines range. (Sentencing Tr. at p. 22) Based on the drug quantities involved, the court found that the total offense level was 38. Initially the court found that Spears' criminal history category was a III. After considering Spears' youth, frequency of prior criminal conduct, and the need to avoid disparities between defendants with similar records, the court determined that his prior criminal history was underrepresented and *increased* his criminal history category to IV. (*Id.* at pp. 20-22) The consequent guidelines sentencing range was 324-405 months imprisonment.

After properly calculating the Guidelines range, the district court considered a variance based on the 100:1 crack/powder quantity ratio inherent in the guidelines. In a nutshell, the 100:1 quantity ratio was reflected in two places at the time of sentencing. First, it was built into the statutory mandatory minimums at 21 U.S.C § 841, which are and were mandatory. Under that section offenses involving 50 grams of crack cocaine or 5 kilograms (5,000 grams) of powder cocaine both triggered a 10 year mandatory minimum sentence. Likewise, offenses involving 5 grams of crack cocaine or 500 grams of powder cocaine both trigger a 5 year mandatory minimum sentence. Where there is a conflict between the Guidelines and the statutory mandatory minimum, the mandatory minimums prevail and the sentence length may not be shorter than

prescribed by statute. The district court adhered to the statutory minimum sentence in this case. Additionally, the 100:1 quantity ratio was also present in section D1.1 of the sentencing guidelines, which are now advisory. The district court below varied from the advisory Guidelines and its use of the 100:1 ratio, while honoring the statutory mandatory minimum sentence of 240 months.

The district court, after considering all of the 18 U.S.C. § 3553(a) factors, found that the guidelines sentence, based on the 100:1 ratio, was greater than necessary and adopted the rationale of *United States v. Perry*, 389 F. Supp. 2d 278 (D.R.I. 2005). In *Perry*, a district court varied from the Guidelines sentence based on its assessment that the 100:1 crack/powder ratio was not justified in light of § 3553(a)(2). *Id.* at 303. In particular, the *Perry* court opined that the guidelines sentence was greater than necessary to reflect the seriousness of the offense and deter criminal conduct. *Id.* That opinion was based, in large part, on the Sentencing Commission's own reports on the issue. Indeed, the commission found that crack cocaine was not as harmful or dangerous as first thought. After a thorough discussion of crack cocaine in light of § 3553(a)(2), the *Perry* court varied downward based on the 20:1 crack/powder quantity ratio suggested by a 2002 Sentencing Commission report.

The district court in this case also varied downward based on the 20:1 crack/powder ratio. All parties agreed that the downward variance based on the 20:1 ratio resulted in an offense level of 34 providing a Guidelines sentencing range of 210 to 262 months. (Sentencing Tr. at p. 23) The district court recognized that the statutory mandatory minimum in the case was 240 months. (*Id.*) Acknowledging that any further variance downward would be moot because the sentencing range was already lower than the mandatory minimum, the court reserved the right to rule on any other variance in favor of the defendant if and when the case was successfully appealed by the government. (*Id.* at pp. 28-29) The court then sentenced Spears to 240 months in prison.

The government appealed the sentence, and Spears appealed the conviction, to the Eighth Circuit Court of Appeals. The case was argued and submitted to a three judge panel consisting of Judges Bye, Lay, and Riley. The court of appeals, surprisingly, issued a split *en banc* opinion without argument, further briefing, or a panel opinion having been issued. *United States v. Spears*, 469 F.3d 1166 (8th Cir. 2006) (en banc). (App. 2) The en banc majority was authored by Judge Riley, who also sat with the original panel, apparently in the minority (given the dissent of Judges Lay and Bye to the *en banc* opinion itself). The court held that "neither *United States v. Booker*, 543 U.S. 220, 264 (2005)

nor § 3553(a) authorizes district courts to reject the 100:1 ratio and use a different ratio in sentencing crack cocaine offenses." *Spears*, 469 F.3d at 1176. (App. 2) The court of appeals affirmed the conviction but reversed the sentence and remanded the case to the district court for resentencing in the split *en banc* decision issued on December 5, 2006.

This Court granted Mr. Spears' petition for certiorari to the Eighth Circuit after it decided *Kimbrough*, vacating the prior Eighth Circuit opinion and remanding for reconsideration.

Taking up the issue for the second time, the Eighth Circuit again rejected the trial court's sentence. The Circuit was split, 6-5, on this issue, which was articulated through three opinions. One opinion, for five judges and written by Judge Riley, asserted that the judge below had improperly sentenced Spears, and that a district court may not "categorically reject the ratio set forth in the guidelines." *United States v. Spears*, ___ F.3d ___, 2008 WL 2485329 (8th Cir. June 23, 2008) (en banc) (*Spears II*) . A second group of five judges disagreed in an opinion written by Judge Colloton. The deciding vote came in a concurrence by Judge Murphy, a former chairperson of the United States Sentencing Commission and an author of the 2002 Sentencing Commission report cited by this Court in *Kimbrough*. Judge Murphy agreed with the Riley opinion's

ban on "categorical rejection" of a guideline, asserting that "The sentencing focus must be on the 'particular defendant' rather than on a whole category of cases." *Spears II*, 2008 WL at *3.

REASONS FOR GRANTING THE PETITION

This case both creates a split in the Circuits and clearly divided the Eighth Circuit itself. At its heart, the problem is a perceived ambiguity in *Kimbrough* — whether or not a sentencing court may categorically reject the sentencing guideline for crack cocaine simply because that court views that guideline as too harsh (or too lenient). Resolution of this question is necessary to provide proper guidance to sentencing courts.

I. The Eighth Circuit's Rule Prohibiting Categorical Rejection of a Sentencing Guideline Presents Important Questions of Constitutional and Federal Statutory Interpretation That This Court Should Decide.

A. The Eighth Circuit has challenged the key holding in Kimbrough that the guidelines' crack-powder ratios may be rejected even in "mine-run" cases.

Though Mr. Spears' case was remanded for further consideration in light of *Kimbrough*, the Eighth Circuit did not give Mr. Spears the benefit of *Kimbrough*'s holding. Instead, the Circuit Court held that the district judge erred by "categorically" rejecting the 100:1 ratio then existing within the sentencing guidelines by applying a different ratio.

This holding ignores the core of this Court's decision in *Kimbrough* — that a court may reject the crack guidelines even in ordinary cases. This Court was very specific in recognizing that the crack guideline at issue here was deeply flawed. As Justice Ginsburg described them in *Kimbrough*, the crack guideline was established in a moment when the Sentencing Commission "abandoned its characteristic institutional role" and acted without considering empirical data or reference to national experience. 128 S. Ct. at 575. Thus, the crack guideline itself could be seen as inappropriate by a district court not only in exceptional cases turning on individualized circumstances, but in average cases which lack such individualized facts:

> Given all of this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, even in a mine-run case. *Id.*

In forbidding sentencing judges from "categorically" rejecting a guideline, the Eighth Circuit runs afoul of this central tenet of *Kimbrough*. This Court, after all, has held that a district court may reject the guidelines even in the absence of mitigating individualized circumstances. What is that, if not a categorical rejection of the guideline at issue on policy grounds? When a sentencing judge sets aside a guideline as simply being too harsh or lenient in a

"mine-run" case, she is clearly rejecting that guideline categorically – it is an unconditional and explicit rejection of that guideline as wrong on its face, regardless of circumstances unique to that case.[1] It is logically impossible to at once recognize that a sentencing judge may reject a sentence solely on the policy shortcomings of a guideline, and then prohibit such a rejection as "categorical." Because it is that *category* of sentences suggested by the guidelines that is necessarily being rejected (even in the absence of individualized mitigating circumstances), this lawful employment of judicial discretion is by definition categorical.

Nothing in *Kimbrough* discourages a court from reasonably rejecting an entire category of guideline cases because that guideline is simply too tough or too soft. This is not simply the interpretation that Mr. Spears gives the *Kimbrough* opinion; it is also the reading given that opinion by Justice Scalia in his *Kimbrough* concurrence.

In that concurrence, Justice Scalia notes that Justice Ginsburg's majority opinion did mention (in dicta) the possibility of closer scrutiny on appeal in non-crack cases where a judge has categorically rejected a guideline. Having joined that majority opinion, he wrote simply to clarify that this statement should not be

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1 The dictionary definition of "categorical" is "unconditional, absolute; positive, explicit." WEBSTER'S UNIVERSAL ENGLISH DICTIONARY 50 (2005).

taken as "an unannounced abandonment" of this Court's statements in several previous cases that district courts must be "free... to reject (after due consideration) the advice of the Guidelines." 128 S. Ct. at 576-577 (Scalia dissent). In context, this clarification makes clear that (at least to Justice Scalia) the *Kimbrough* majority opinion should not be read to disallow a broad rejection of a sentencing guideline on policy grounds alone—exactly the reading given the *Kimbrough* opinion by the Eighth Circuit.

Kimbrough established that a district court may reject the crack guideline on policy grounds alone. Whether that ability is characterized as applying in a "mine-run case" or "categorically" makes no difference -- *Kimbrough* addressed and answered *this* question, in *this* context.

B. It was not error for the District Court to employ a reasonable alternative to the 100-1 ratio as a means of determining what sentence would be sufficient but not greater than necessary.

Honesty and transparency in sentencing are goals lauded by this Court in both *Rita v. United States*, ___ U.S.___, 127 S. Ct. 2456, 2469 (2007), and *Booker*. As the dissent in *Spears II* convincingly argued, the principles of honesty and transparency are furthered by the district court's approach of categorical rejection of the 100-1 ratio and embrace of a different, reasonable ratio. The district court below followed proper procedure and both considered

the 18 U.S.C. § 3553(a) factors in whole and calculated the proper guideline range, and in fact even allowed an upward departure for criminal history. The error alleged by the Eighth Circuit was that the sentencing judge chose a well-recommended, honest, and transparent alternative to the guideline it was rejecting. The Eighth Circuit's rejection of this approach warrants review.

In *Kimbrough*, this Court did, in fact, speak approvingly of the district court's procedure in part because that court "did not purport to establish a ratio of its own." 128 S. Ct. at 575. However, the *Kimbrough* opinion also spoke approvingly of a district court that crafts a sentence "in line with § 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necess. .y' to accomplish the sentencing goals advanced in § 3553(a)(2)." Id. Because the guideline at issue in both *Kimbrough* and this case expressed the relationship between crack and powder cocaine in terms of ratios, it is natural that sentencing courts will use alternative ratios as a means of determining what sentence will be "sufficient, but not greater than necessary."

Such an approach is most consistent with the type of sentencing process this Court has sought in *Booker* and its progeny. When a judge rejects a guideline on policy grounds (as *Kimbrough* allows), it best serves the causes of honesty and transparency if that judge clearly articulates the alternative

calculation that is being used. The alternative ratio used in this case, 20-1, made explicit the precise degree to which the sentencing judge was deviating from the relevant guideline. Further, that ratio was chosen for its reasonableness—it was that ratio which was recommended by the United States Sentencing Commission in its 2002 Report to Congress on Cocaine Sentencing. It makes no sense to bar district courts from taking the advice laid out in such a report. Such a bar, oddly, excises mention or use of the recommended ratio *because* it is transparent and honestly directive, qualities which should be encouraged in sentencing.

In a case where a sentencing court's only basis for a variance is a policy disagreement with a guideline, the Eighth Circuit appears to prefer that a course which encourages a sentencing judge to either create an individualized factor or otherwise obscure her reasoning in rejecting a guideline on policy grounds. The dissent below points out the quandary a district judge confronts when rejecting a ratio-based guideline (such as § 2D1.1) on policy grounds alone. If that judge is not allowed to even consider basing his sentence on a different ratio, he is deprived of the chance to use an important analytical tool — the very tool employed by the sentencing commission itself in its own analysis of the crack guidelines. On the other hand, if the Eighth Circuit is instead saying that a judge is allowed to consider a different ratio but may not reveal what it is in

announcing a sentence, then the Eighth Circuit is simply requiring subterfuge. It is error for the Eighth Circuit to simultaneously acknowledge that the guidelines are only advisory, and then bar district courts from employing the analytical tool that the sentencing commission itself used to critique the guideline.

C. If courts are not allowed to categorically reject the sentencing guideline for crack, the federal sentencing scheme violates the Sixth Amendment.

As Justice Scalia described in his *Kimbrough* concurrence, the majority opinion in that case should not be read as an "abandonment" of the principle, articulated in several prior cases, which allows a district court to reject a guideline only because of its policy—that is, because it is too harsh or too lenient when viewed within the context of 18 U.S.C. § 3553(a) as a whole, including that statute's demand that a sentence properly account for the "seriousness of the offense." 128 S. Ct. at 576-577. One example Justice Scalia cites is the direction given in *Rita*, which allows for variance from a guideline "perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless." 127 S. Ct. at 2465. A variance based on a finding that a guideline itself "fails properly to reflect § 3553(a) considerations" — that is, because the guideline does not properly reflect the seriousness of the offense and is either too

harsh or too lenient -- is fairly described as "categorical," in that it represents a rejection of that guideline even in the absence of mitigating individualized circumstances.

Now the Eighth Circuit has barred such categorical rejections. The result of this rule will be that in cases where there are no mitigating individual circumstances the judge will be faced with a mandatory guideline because she cannot "categorically" reject the relevant guideline, and has no other options. This violates the Sixth Amendment in exactly the way this Court described in *Booker*: Sentencing would take place within a scheme in which judges raise sentences on facts they find, without the option of setting aside the guideline itself as merely advisory. Because this case raises this important constitutional question, it merits further review by this Court.

D. The question presented remains vital despite the recent amendment of sentencing guideline 2D1.1.

The sentencing guidelines were amended on November 1, 2007, after Spears (and Kimbrough), were sentenced. This amendment reduced the base offense level for crack by two offense levels across the board, resulting in a crack/powder ratio that varies depending on the weight of the drugs at issue.

Though the 100:1 ratio at issue here is no longer a part of the guidelines themselves, the issue presented here will live on because the amended guideline

still maintains a discrepancy between powder and crack cocaine which may be categorically rejected by sentencing judges who view it as too harsh. As this Court noted in *Kimbrough* itself, this "modest" amendment was seen by the sentencing commission as only a partial remedy for the unreasonableness of the crack guidelines. 128 S. Ct. at 569. Because the gap between powder and crack cocaine remains wide, the issue in this case must be resolved in order to provide direction to sentencing judges who now are unsure if an explicit rejection of the crack guideline on policy grounds might be reversed as "categorical."

II. The Eighth Circuit's Rule Prohibiting the Categorical Rejection of a Sentencing Guideline Conflicts with Several Circuits' Interpretation of Kimbrough.

The Eighth Circuit's holding that a district court may not "categorically reject" a particular Sentencing Guideline based on a "policy disagreement" conflicts with circuit courts around the country. Moreover, the Eighth Circuit's requirement that a district court must consider the "individualized, case specific facts" splits with the post-*Kimbrough* decisions of many circuits. Out of hundreds of published decisions, only the Third Circuit even arguably agrees with the reasoning espoused in *Spears II*. The Eighth Circuit's decision should be reversed to bring conformity to the nation's post-*Kimbrough* sentencing law.

In a striking example of the current conflict, the First Circuit recently held "that district judges may deviate from the guidelines even on the bases of *categorical policy disagreements*." *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (emphasis added). In *Boardman*, the defendant's argument on appeal was *not* that his individual circumstances warranted a variance, but rather, that the district judge could vary based on a policy disagreement with the guidelines. *Id.* Because the district judge did not know he had the discretion to vary based on the "Commission's policy judgment," the court went on to vacate the defendant's sentence. *Id.*

Similarly, in *United States v. Ford*, 271 Fed. Appx. 532 (7th Cir. 2008), a defendant argued that he deserved a lighter sentence based on the crack/powder disparity and not based on individualized circumstances. The district court refused to vary, believing that it did not have the discretion to do so based on a policy disagreement with the guidelines. *Id.* at 533. The Seventh Circuit reversed, noting that "after *Kimbrough*, even in a *mine-run case*, district courts may impose lower sentences based on a determination that the ratio produces a sentence greater than necessary for a particular defendant." *Id.* at 534 (emphasis added). This disagreement may be based solely on a policy disagreement with -- or categorical rejection of -- the guidelines. *See id.*

Several other circuits' holdings have disagreed with the Eighth Circuit's post-*Kimbrough* limitation on sentencing discretion. *United States v. McGowan*, 2008 WL 1953543, (11th Cir. 2008) (noting that it is not an abuse of discretion to "reduce [a defendant's] sentence based on a policy disagreement with the crack/powder disparity"); *United States v. Banks*, 2008 WL 2824888, *2 (4th Cir. 2008) (reversing a sentence in light of *Kimbrough's* command that it is not an abuse of discretion to vary based on the crack/powder ratio in a "mine-run" case); *see also United States v. Pickett*, 475 F.3d 1347, (D.C. Cir. 2007) ("a sentencing court errs when it believes that it has no discretion to consider the crack/powder differential incorporated in the Guidelines") (quotations omitted).

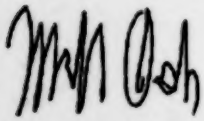
Only the Third Circuit arguably agrees with the Eighth Circuit's reasoning in *Spears II*. In *United States v. Gunter*, 527 F.3d 282 (3d Cir. 2008), a defendant appealed a crack sentence. The district court refused to vary based on its observation that it could not "second guess the Sentencing Commission or the Congress" and reduce the sentence based on the crack/powder disparity. *Id.* at 287. The court of appeals held that a district court must consider "individualized circumstances" and any "approach that categorically rejects the crack powder disparity without an individualized assessment" is forbidden, affirming the sentence. *Id.* at 286.

Thus, like the Eighth Circuit's decision in *Spears II*, the Third Circuit's decision is in direct conflict with the circuit courts that hold that a district court may categorically reject a guideline based on a policy disagreement. Both *Spears II* and *Gunter* are incorrect under *Kimbrough* and both generate inconsistency in sentences for similar criminals committing similar crimes. This inconsistency is not based on permissible disparity between various district courts but, instead, is based on an erroneous legal limitation on sentencing discretion that applies in some parts of the country and does not apply in others. This Court should resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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RESPONSE REQUESTED

(3)

ORIGINAL

No. 08-5721

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IN THE SUPREME COURT OF THE UNITED STATES

STEVEN SPEARS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court may substitute its own powder-to-crack quantity ratio for the 100:1 ratio in the advisory Guidelines and apply that ratio to determine the sentence without also applying the sentencing factors in 18 U.S.C. 3553(a) to the particular facts and circumstances in the case before it.

IN THE SUPREME COURT OF THE UNITED STATES

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STEVEN SPEARS, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1, at 1-8) is reported at 533 F.3d 715. The order of this Court vacating the court of appeals' earlier opinion and remanding the case for further consideration in light of Kimbrough v. United States, 128 S. Ct. 558 (2007), is reported at 128 S. Ct. 858. The court of appeals' earlier opinion (Pet. App. 2, at 1-26) is reported at 469 F.3d 1166.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2008. The petition for a writ of certiorari was filed on August

12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted of conspiracy to distribute 50 grams or more of crack cocaine and 500 grams or more of powder cocaine, in violation of 21 U.S.C. 846. The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. The court of appeals sitting en banc affirmed petitioner's conviction, but reversed his sentence and remanded for resentencing. This Court granted a petition for a writ of certiorari, vacated the judgement, and remanded for further consideration in light of Kimbrough v. United States, 128 S. Ct. 558 (2007). On remand, the court of appeals sitting en banc again affirmed the conviction, reversed the sentence, and remanded for resentencing. Pet. App. 1, at 1-8.

1. On June 2, 2004, law enforcement officers responded to a report of drug trafficking in a hotel room in Sioux City, Iowa. The officers observed a large number of people entering and exiting the room. They also stopped and searched a number of vehicles whose occupants had been seen leaving the room and found crack cocaine in the vehicles. The officers obtained a warrant to search the hotel room. Inside, they found petitioner and two others.

Petitioner was carrying $805 in cash, and he later admitted that he had sold powder and crack cocaine. Pet App. 2, at 3; Gov't C.A. Br. 6.

2. A grand jury returned an indictment charging petitioner with conspiracy to distribute powder and crack cocaine, in violation of 21 U.S.C. 846. Indictment. At trial, the jury found petitioner guilty of the conspiracy and found that he had been responsible for 1792 grams of crack cocaine and 500 grams of powder cocaine. Jury Verdict Form; Pet. App. 2, at 4.

At sentencing, the district court determined that petitioner's total offense level was 38 and his criminal history category was IV, resulting in an advisory Guidelines range of 324 to 405 months of imprisonment. Pet. App. 2, at 4; Pet. App. 4, at 20-22.[1] Petitioner asked the court to vary downward, arguing that the 100:1 powder-to-crack quantity ratio in the Guidelines would result in a sentence that would be substantially greater than necessary to promote the objectives in 18 U.S.C. 3553(a). The court agreed and concluded that it should use a 20:1 ratio instead. Pet. App. 2, at 8-9; see Pet. App. 4, at 26-29, 32-33. The court did not give an independent explanation for why it adopted that particular ratio, but instead expressly relied on the rationale in United States v.

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[1] The court increased petitioner's criminal history by one point, taking it from category III to category IV, on the ground that his criminal history was "substantially underrepresented." Pet. App. 4, at 20-21.

Perry, 389 F. Supp. 278 (D.R.I. 2005). Pet. App. 2, at 4, 9; Pet. App. 4, at 32. In Perry, the court adopted the 20:1 ratio based on a "finding [that] it made 'the most sense' because it was the ratio recommended by the Sentencing Commission in the 2002 Report." Pet. App. 2, at 8 (citing and quoting Perry, 389 F. Supp. 2d at 307-308).

The district court then recalculated the Guidelines range using the 20:1 ratio, which resulted in an offense level of 34 and a general sentencing range of 210 to 262 months of imprisonment. Because petitioner had a prior felony drug conviction, however, he was subject to a mandatory-minimum sentence of 240 months of imprisonment under 21 U.S.C. 841(b)(1)(A), making the effective range 240 to 262 months. Pet. App. 2, at 9; Pet. App. 4, at 23, 33-34.

Having decided to apply a 20:1 ratio, the court declined to conduct a case-specific analysis of the particular facts and circumstances of petitioner's offense and background under Section 3553(a). The court concluded that it did not need to engage in that analysis because application of the 20:1 ratio had already taken the sentencing range down to the mandatory minimum. In the court's view, this rendered any further Section 3553(a) analysis "a moot question." Pet. App. 4, at 28; see also id. at 26-27. The court also stated that if the court of appeals reversed the sentence, "then at that time I reserve my right to take a look anew

at the 3553(a) other factors because I really haven't ruled on those now." Id. at 28-29. The court accordingly sentenced petitioner to the statutory, mandatory-minimum sentence of 240 months of imprisonment. Pet. App. 2, at 9; Pet. App. 4, at 34.

3. a. Petitioner appealed his conviction, and the government cross-appealed his sentence. Pet. App. 2, at 3. After deciding to hear the case en banc on its own motion, 10/18/06 Order, the court affirmed petitioner's conviction but reversed his sentence and remanded the case for resentencing, Pet. App. 2, at 3. With regard to petitioner's sentence, the court held that district courts are not authorized "to reject the 100:1 quantity ratio and use a different ratio in sentencing defendants for crack cocaine offenses." Id. at 11. The court reasoned that Congress has repeatedly "elected not to revise the 100:1 quantity disparity between powder cocaine and crack cocaine" and that judges were not free to substitute their own policy view for Congress's in this regard. Id. at 13.

In addition, in response to the dissent's argument that Section 3553(a) permits consideration of non-case-specific factors, as well as case-specific factors, the majority explained that, regardless, the district court failed to engage in the required consideration of case-specific factors: "the district court failed to perform a § 3553(a) analysis at all, stating, 'once I made the decision I was going to vary on the [Perry] crack ratio basis, I

didn't really look at the other [§ 3553(a) factors] because to me it was a moot question.' * * * Although the dissent believes district courts are not limited to considering case-specific circumstances under § 3553(a), under this circuit's precedent, a district court must, at a minimum, perform the § 3553(a) analysis." Pet. App. 2, at 11-12 (alterations in original); see also id. at 13.

b. Petitioner filed a petition for a writ of certiorari challenging the court of appeals' sentencing decision. While that petition was pending, this Court issued its decision in Kimbrough v. United States, 128 S. Ct. 558 (2007). There, the Court held that "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant" that the disparity between the Guidelines' treatment of crack and powder cocaine offenses "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." Id. at 575. In so holding, the Court rejected the government's argument that the Guidelines reflected a congressional policy determination that the district court's sentences for crack and powder offenses must comport with the 100:1 quantity ratio in 21 U.S.C. 841(b). See Kimbrough, 128 S. Ct. at 571-573. To the contrary, the Court concluded, Section 841(b) "mandates only maximum and minimum sentences"; it "says nothing about the appropriate sentences within these brackets." Id. The crack/powder disparity in the Guidelines

reflected the Commission's decision to model the Guidelines on Congress's mandatory minimum sentences. Id. at 575. The Court reaffirmed that, while Section 3553(a) "requires a court to give respectful consideration to the Guidelines," those Guidelines are advisory, not mandatory. Id. at 570. Therefore, courts may decide that a Guidelines sentence, even in a mine-run case, would be "'greater than necessary'" to achieve the sentencing purposes in Section 3553(a) for that defendant. Id. at 575. Following that decision, the Court granted petitioner's petition for a writ of certiorari, vacated the decision of the court of appeals, and remanded for further consideration in light of Kimbrough. Spears v. United States, 128 S. Ct. 858 (2008).

c. On remand, the en banc court of appeals affirmed petitioner's conviction, reversed his sentence, and remanded for resentencing. See Pet. App. 1, at 1-8.

i. The majority explained that the district court here had not conduct "a proper § 3553(a) analysis." Pet. App. 1, at 2.[2] In particular, the district court failed to conduct "'an individualized, case-specific evaluation of the facts or of the defendant,'" and instead simply "'varied by replacing the 100:1

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[2] Although petitioner suggests (Pet. 6) that the court of appeals divided 5-1-5, and that there was no majority opinion, Judge Murphy specifically stated that she "concur[red] in Judge Riley's opinion," rather than concurring in the judgment only, Pet. App. 1, at 4, thereby making Judge Riley's opinion a majority opinion. The dissent also refers to Judge Riley's opinion as "the majority." Id. at 6.

quantity ratio inherent in the advisory Guidelines range with a 20:1 quantity ratio.'" Id. at 1, at 2-3 (quoting Pet. App. 2, at 13); id. at 2 ("district court substituted its own ratio, and did not conduct any additional analysis under § 3553(a)"). While "a district court may determine the 100:1 quantity ratio results in a harsher sentence than necessary," it may not simply "categorically reject the 100:1 ratio and substitute its own" ratio in lieu of "considering the overall goals of sentencing under § 3553(a) and conducting an individualized assessment of a defendant's case." Id. at 3 (internal quotation marks and citation omitted).

ii. Judge Murphy filed a concurring opinion to explain the basis for her disagreement with the dissent. Pet. App. 1, at 3-4. In Judge Murphy's view, district courts should not adopt "their own policy ratio to be applied in every cocaine case." Id. at 4. She explained that "[t]he role of the sentencing judge is not the same as that of a legislative policymaker. The sentencing focus must be on the 'particular defendant' rather than on a whole category of cases." Ibid.

iii. Judge Colloton, joined by four other members of the court, filed a dissenting opinion. Pet. App. 1, at 4-8. He rejected the view that the district court had simply applied a substitute ratio and had failed to conduct the required full Section 3553(a) analysis to the particular facts and circumstances. Id. at 7. In his view, the record indicated instead that the

district court had fully evaluated the Section 3553(a) factors, but had simply declined to resolve outstanding questions that would not affect the sentence the court would impose. Ibid.

The dissent also concluded that it was appropriate for each district court to adopt its own ratio to help guide its application of Section 3553(a) across the range of crack-cocaine cases seen by that court. Pet. App. 1, at 4-7. The dissent did not regard this Court's decision in Kimbrough as barring such an approach. Id. at 4. Moreover, the dissent concluded, the use of a court-specific ratio would promote consistent, rational, and transparent sentencing by that court and would be consistent with the authority of district courts to give weight to their own policy views on sentencing issues. See id. at 4-7.

ARGUMENT

Petitioner contends (Pet. 7-18) that the court of appeals erred in holding that "a sentencing court may [not] categorically reject the sentencing guidelines for crack cocaine simply because that court views that guideline as too harsh," id. at 7, and that a sentencing court may not adopt its own "reasonable alternative to the 100-1 ratio as a means of determining what sentence would be sufficient but not greater than necessary," id. at 10. Petitioner's claims do not warrant this Court's review. The court of appeals did not reject the ability of district courts to disagree on pure policy grounds with the 100:1 ratio. It instead

held that a sentencing court may not stop there and rest its sentencing decision on this one factor; the sentencing court must conduct a full Section 3553(a) analysis that also considers the particular facts and circumstances of the specific case before it. And to the extent the court of appeals also held that district courts should not adopt a specific replacement ratio, that issue does not warrant review in this case. The petition is interlocutory; that was not a necessary basis for the decision; and the court of appeals' decision does not conflict with any other court of appeals on the question whether a district court can base its sentence solely on its own substitute ratio, without conducting a full Section3553(a) analysis.

1. The court of appeals reversed petitioner's sentence and remanded the case to the district court for resentencing. Pet. App. 1, at 2. Its decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for the denial of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); accord Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967); American Constr. Co. v. Jacksonville, Tampa and Key West Ry., 148 U.S. 372, 384 (1893); Virginia Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., concurring in the denial of certiorari).

While not an invariable rule, denying review of the court of appeals' interlocutory decision makes particular sense here. The decision was based in large measure on the district court's procedural error, namely its failure to conduct the full Section 3553(a) analysis. See Pet. App. 1, at 2-3. The district court, moreover, indicated its willingness to consider other potential bases for a downward variance if the case were to be remanded for resentencing. See, e.g., Pet. App. 1, at 28-29. At present, petitioner's resentencing has been stayed pending resolution of his certiorari petition. 8/15/08 Order. It is quite possible that petitioner will receive the same or a substantially similar sentence on remand, even if the court of appeals' decision stands, thus potentially mooting these issues as to petitioner. Even if the matter is not mooted by petitioner's resentencing, a subsequent appeal may help to narrow or clarify the issues presented, including the scope and meaning of the court of appeals' decision.

2. Petitioner contends that the court of appeals held that sentencing courts may not reject the Sentencing Guidelines for crack cocaine on pure policy grounds, but must instead rest any rejection of that ratio on case-specific facts or circumstances. E.g., Pet. 8-9. As a result, petitioner contends, the practical effect of the court of appeals' decision is to prevent a sentencing court from rejecting the 100:1 powder-to-crack ratio in a mine-run case, which is directly contrary to this Court's decision in

Kimbrough, supra. Ibid. Petitioner's contention is based on a misreading of the court of appeals' decision, and, because his argument for this Court's review rests on that misreading, those arguments lack merit.

a. Petitioner contends that the district court conducted a full and complete analysis of the factors in Section 3553(a). E.g., Pet. 10-11. The court of appeals, however, disagreed. In both its initial decision and its decision following remand, the court of appeals explained that the district court had not conducted the full Section 3553(a) analysis as required by governing precedent. The district court instead simply "substituted its own ratio, and did not conduct any additional analysis under § 3553(a)." Pet. App. 1, at 2; see also Pet. App. 2, at 11-12 ("Yet, in the present case, the district court failed to perform a § 3553(a) analysis at all. * * * [U]nder this circuit's precedent, a district must, at a minimum, perform the § 3553(a) analysis.").

Petitioner, like the dissent below (Pet. App. 1, at 7), disagrees with that reading of the record. See, e.g., Pet. 10-11. The majority's conclusion, however, is supported by the district court's own statements about what it did. The district court at sentencing did not provide an analysis of the 3553(a) factors in light of the facts and circumstances of the case. Instead, it adopted a substitute ratio and applied that ratio to yield a

particular sentence, the mandatory minimum under the statute. It did not further address whether that substitute ratio yielded a sentence that was sufficient, but not greater than necessary, to achieve the sentencing purposes in Section 3553(a) in light of the particular facts and circumstances of this case.[3] See, e.g., Pet. App. 1, at 2 (quoting the district court's statement that "I didn't really look at the other § 3553(a) factors because to me it was a moot question"); see also Pet. App. 4, at 28-29, 32-34. And the failure to apply Section 3553(a) to the facts and circumstances of the particular defendant's case is procedural error. See, e.g., Gall v. United States, 128 S. Ct. 586, 596-597 (2007); Pet. App. 1, at 2-3; see also Pet. App. 2, at 11-12 ("[T]he district court failed to perform a § 3553(a) analysis at all. * * * [U]nder this circuit's precedent, a district must, at a minimum, perform the § 3553(a) analysis."). In any event, a dispute over whether the district court conducted a case-specific analysis under Section 3553(a) does not warrant this Court's review. See S. Ct. R. 10.

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[3] Petitioner suggests (Pet. 11) that the fact that the district court granted an upward departure under the Guidelines because petitioner's criminal history category understated the severity of his criminal history, demonstrates that the court conducted the full, case-specific analysis required by Section 3553(a). Even if this were considered part of the Section 3553(a) analysis, rather than (as was the case) a departure determination under the Guidelines, it is but one aspect of the facts and circumstances of the case and the range of Section 3553(a) factors the court was required to consider.

b. Nor did the court of appeals hold that a district court's policy disagreement with the Guidelines could not form the basis for a variance in an ordinary or mine-run case. Petitioner focuses on the court of appeals' statement that "the district court may not categorically reject the ratio set forth by the Guidelines," Pet. App. 1, at 3, and construes that statement as forbidding a district court from basing a variance "solely on the policy shortcomings of a guideline," Pet. 9. The court of appeals did not, however, state that a policy disagreement with the Guidelines is not an adequate basis for a variance. Rather, as described above (pp. 7-8, 11-13), the court recognized that a policy disagreement with the Commission's judgement in the Guidelines may be the basis for a variance, but that such a policy disagreement does not eliminate the sentencing court's obligation to conduct a full Section 3553(a) analysis in light of the facts and circumstances of the particular case before it.

Petitioner's reading of the court of appeals' decision is inconsistent with a subsequent, express statement by the Eighth Circuit on the authority of courts to disagree with the crack-to-powder ratio in the Guidelines. In United States v. Davis, 538 F.3d 914 (8th Cir. 2008), the court reversed as plain error a district court's refusal to consider the powder-to-crack ratio as a basis for a variance. Significantly, the court expressly stated that Kimbrough held that "a sentencing court's disagreement with

that ratio, even in the mine-run case, could be a discretionary basis for lowering a defendant's sentence." Id. at 918. In light of that decision, the Court need not grant review to clarify whether a sentencing court in the Eighth Circuit may vary based on a policy disagreement with the Guidelines in a mine-run case. The Eighth Circuit has made clear that a district court may do so, as long as the sentencing court also conducts the required Section 3553(a) analysis to determine that the resulting sentence is sufficient, but not greater than necessary, under the facts and circumstances of that defendant's case.

The court of appeals' insistence on an individualized sentencing assessment, of which the crack/powder disparity may be a factor, is consistent with this Court's repeated emphasis in Kimbrough on the individualized nature of the sentencing decision. For example, this Court held in Kimbrough that a "[t]he judge may determine * * * that, in the particular case, a within-Guidelines sentence is 'greater than necessary'" and that "[i]n making that determination, the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses." 128 S. Ct. at 564 (emphasis added); id. at 575 ("[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' * * * even in a mine-run case.") (emphasis added); ibid. (noting "court did not purport to

establish a ratio of its own," but instead "appropriately framed its final determination in line with § 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary'"); id. at 576 (stating that "the District Court properly homed in on the particular circumstances of Kimbrough's case").[4]

A requirement of individualized sentencing similarly accords with the approach taken by other courts of appeals. See, e.g., United States v. Russell, 537 F.3d 6, 11 (1st Cir. 2008) (stating that, "consistent with Kimbrough," the court has "emphasize[d] the importance of individualized, case-by-case sentencing determinations, rather than reliance on generalized ratios" and that the crack/powder disparity "is properly considered as one of the factors woven into the tapestry as the district considers what sentence is 'sufficient, but not greater than necessary' in each individual case"), cert. denied, No. 08-6067, 2008 WL 4064927 (Oct. 14, 2008); United States v. Barsumyan, 517 F.3d 1154, 1159 (9th Cir. 2008) ("The touchstone of a policy-based argument against the Sentencing Guidelines * * * is not that a particular upward or

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[4] It is also consistent with this Court's general emphasis on the district court's role in, and importance of, making an individualized sentencing determination. See, e.g., Gall, 128 S. Ct. 596-598; Rita v. United States, 127 S. Ct. 2456, 2465, 2469 (2007); see also Koon v. United States, 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.").

downward adjustment, measured in levels, is unreasonable in isolation, but rather that its operation in the case under consideration results in a sentence, measured in months and years, that is inappropriate in light of § 3553(a). We then review that final, holistic sentencing determination for reasonableness.").

c. For the same reasons, there is no merit to petitioner's claim (Pet. 15-18) that review is warranted because the "Eighth Circuit's holding that a district court may not 'categorically reject' a particular Sentencing Guideline based on a 'policy disagreement' conflicts with circuit courts around the country," id. at 15. As discussed above, the court of appeals did not hold that a variance could not be based on a general policy disagreement with the Guidelines, and the Eighth Circuit has subsequently expressly stated that a policy disagreement, even in a mine-run case, can be the basis for a variance. Thus, the purported conflict does not exist.[5]

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[5] Petitioner contends (Pet. 17-18) that in United States v. Gunter, 527 F.3d 282 (2008), the Third Circuit held, as petitioner argues the court of appeals did in this case, that a variance cannot be based solely on the district court's policy disagreement with the Guidelines' disparate treatment of crack and powder cocaine offenses. To the contrary, the court in Gunter appears to have held (like the court below) that a policy disagreement can be the basis for a variance, but that the presence of a policy disagreement does not eliminate the sentencing court's ultimate obligation to determine, based on the facts and circumstances of the particular case, the sentence that is sufficient, but not greater than necessary, to achieve the sentencing purposes in Section 3553(a). See id. at 285-286. Gunter went on to stress that, "even in the ordinary case, the district court may determine that the crack/powder ratio yields a sentence that is greater than

3. Petitioner also contends (Pet. 10-13) that the court of appeals erred in holding that a district court may not adopt its own powder-to-crack ratio to guide its sentencing decision. That issue does not warrant review in this case. The decision below relied on the district court's procedural error in failing to conduct a full, case-specific analysis under Section 3553(a), and that error provided a full and adequate basis for reversing petitioner's sentence. See also pp. 10-11, supra (because the decision is interlocutory, the claims may well be mooted upon resentencing).

A holding that a sentencing court may not adopt its own ratio would not conflict with a decision of this Court or decisions of other courts of appeals. As petitioner acknowledges (Pet. 11), the Court did not decide this question in Kimbrough, supra. To the contrary, as the dissent below notes, there are statements in

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necessary after giving proper consideration to the § 3553(a) factors and the circumstances of the particular case." Ibid. (emphasis added). And, as petitioner argues elsewhere (Pet. 8-9), the ability to vary in the "ordinary case" necessarily means that a district court can vary based solely on its policy disagreement with the crack/powder disparity. Although in United States v. Sevilla, 541 F.3d 226 (2008), the Third Circuit described Gunter as "mak[ing] clear that any determination at step three that the crack/powder cocaine disparity is 'too vast' must give reasons that relate to the particular defendant and not be a categorical rejection of that disparity," id. at 232 n.5, that statement is dictum, and, in any event, does not warrant review of the opinion in this case from the Eighth Circuit, especially in light of the Eighth Circuit's express recognition, in Davis, 538 F.3d at 918, that district courts may vary from the Guidelines based solely on a policy disagreement with the crack/powder ratio.

Kimbrough looking favorably on the fact that the district court "'did not purport to establish a ratio of its own,' and 'homed in on the particular circumstances of Kimbrough's case.'" Pet. App. 1, at 4 (quoting Kimbrough, 128 S. Ct. at 575). The Court was not, however, presented with the question and therefore did not decide whether "a district court is forbidden to consider an alternative crack/powder ratio as a means of determining what sentence is 'sufficient, but not greater than necessary' to comply with the purposes of § 3553(a)(2)." Ibid. And while petitioner provides reasons why the use of a substitute ratio might be "consistent with the type of sentencing process this Court has sought in Booker and its progeny," Pet. 11, none of those cases addressed the issue. Similarly, petitioner has not identified (and we are not aware of) any other court of appeals decision with which the opinion in this case conflicts on the question whether a district court may adopt an explicit substitute ratio and impose sentence based solely on that factor. For all these reasons, review of the issue in this case would be both premature and unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

STEVEN SPEARS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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Argument in Reply

I. The Opinion Below Properly Presents the Question of Whether or Not a District Court May Categorically Reject the Sentencing Guideline for Crack Cocaine as Too Harsh.

All three of the opinions of the *en banc* Eighth Circuit below (Judge Riley's opinion for five judges, Judge Murphy's opinion concurring with Judge Riley, and Judge Colloton's dissent on behalf of five judges) insist that this case turns on the question of whether or not a sentencing court may categorically reject a sentencing guideline. Despite this, the government reads the opinions below to instead address a failure by the trial court to consider the 18 U.S.C. § 3553(a) sentencing factors at all, constituting procedural error.

The government's strained reading misconstrues those opinions in three ways. First, all three opinions plainly focus on the sentencing judge's categorical rejection of a guideline rather than procedural error. Second, to the extent that the opinion of Judge Riley may imply a failure to consider § 3553(a) factors, the implication is not that the district court failed to consider the § 3553(a) factors at all, but that the sentencing judge should have considered them a *second* time in order to come up with a particularized circumstance to justify the use of an alternative ratio for powder/crack cocaine sentences (and thus avoid the categorical use of an alternative ratio). Third, the record shows that, at any rate, proper procedure was followed in the district court.

A. Judge Riley's and Judge Murphy's opinions turned on the question of categorical rejection of the guidelines, not sentencing procedure.

Judge Riley's opinion makes clear what the ruling is about -- replacing the 100:1 ratio between powder and crack cocaine with an alternate, categorically-applied ratio in the absence of mitigating facts. The language of Judge Riley's opinion reflects this focus on what he sees as the need to base an alternate ratio on individualized facts rather than applying such alternate ratios categorically:

> The district court therefore 'impermissibly varied by *replacing* the 100:1 quantity ratio inherent in the advisory guideline range with a 20:1 quantity ratio.' [quoting *Spears I*] Additionally, 'the district court did not vary from the advisory Guidelines range based on an individualized, case-specific evaluation of the facts or of the defendant.' [quoting *Spears I*] In considering the overall goals of sentencing under § 3553(a) and conducting an *individualized assessment* based upon the particular circumstances of a defendant's case, a district court may determine the 100:1 quantity ratio results in a harsher sentence than necessary. However, the district court may not categorically reject the ratio set forth by the Guidelines.
>
> This determination is directly in line with the Third Circuit's reasoning in *Gunter*, where the court explained, 'we do not suggest (or even hint) that the Court *categorically reject* the 100:1 ratio and *substitute its own*, as this is *verboten*.' Nothing in *Kimbrough* suggests the district court may substitute its own ratio for the ratio set forth in the Guidelines. *United States v. Spears*, 533 F.3d 715, 717 (2008) (citations omitted, emphasis original to *Spears II*).

By quoting extensively from *Spears I* and specifically placing emphasis where he did, Judge Riley is straightforwardly stating the problem in this case is (for him) replacing the guideline ratio with another ratio as a *categorical* matter. Had he chosen to make this a case about procedure, one would have expected him to be much clearer in doing so.

Similarly, the opinion by Judge Murphy which gave a majority in favor of reversal also focuses intently on the issue of the categorical rejection of a guideline, and her opinion does not even imply that there was a procedural problem of any kind. The heart of her opinion asserts that "[r]ather than suggesting that a sentencing judge may develop his or her own policy ratio for the range of cocaine cases as the dissent proposes, in *Kimbrough* the Court approved a sentencing approach based on the "particular circumstances" of the defendant's case." *Spears II*, 533 F.3d at 718. Like Judge Riley, Judge Murphy would require a finding which identifies a "particular circumstance" if a guideline is to be rejected, and it is this conclusion, common to both opinions, which the Petitioner argues is contrary to *Booker* and *Kimbrough*.[1] This case squarely presents that issue.

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[1] Apart from its independent significance as a sixth and deciding vote, Judge Murphy's concurring opinion reflects how she reads the Riley opinion -- that is, as one that is about categorical rejection of a guideline, not procedure.

B. Any implication of procedural error involves the failure to examine the § 3553(a) factors a second time in order to justify an alternate powder/crack ratio on particularized circumstances.

At most, the Riley opinion *implies* a procedural error by quoting the following statement from the district judge at the sentencing hearing: "Once I made the decision I was going to vary on the crack ratio basis, I didn't really look at the other § 3553(a) factors because to me it was a moot question. I'll only look at that issue should this sentence be reversed on the 20-to-1 ratio." *Spears II*, 533 F.3d at 717 (citations omitted). Viewed in context, the sentencing judge was simply noting the fact that there was no need to consider additional mitigating factors at that time, because he was already running up against the statutory minimum by employing the 20-to-1 ratio.

In quoting this passage, the Riley opinion seems to want to call attention to the fact that the district court did not consider other § 3553(a) factors *specifically to justify the 20:1 ratio*. This is consistent with the Riley opinion's theme, asserting that individualized factors are needed to justify an alternative ratio. The procedure Judge Riley implies would apply only where an alternate ratio is used—that is, even if a judge has already considered the § 3553(a) factors (as the judge did here), he must consider them again directly in conjunction with the use of an alternate ratio. The short introduction Judge Riley inserted before quoting the district court -- "Rather, the district court substituted its own ratio, and did not

consider any *additional* analysis under § 3553(a)," *Spears II*, 533 F.3d at 717 (emphasis added) -- does not assert that no analysis of the § 3553(a) factors was undertaken. Thus, Judge Riley was not alleging that the district court failed to conduct any analysis under § 3553(a), as the government contends -- rather, he was implying that the district court should have undertaken *additional* analysis of those factors in order to justify the 20:1 ratio, which is simply consistent with the rest of the opinion's language which also argues that an alternative ratio is allowable only in relation to specific facts, not categorically. Requiring such additional analysis is not only consistent with, but *necessary to* the position that a new ratio can only be justified through individualized factors -- such analysis would be the only way such a variance could ever be justified. Only by looking at that introduction in isolation is the government able to create the misleading idea that the Riley opinion turned on a failure at sentencing to consider § 3553(a) factors at all.

C. The district court followed proper sentencing procedure.

Because it is focused on the idea of categorical rejection of a guideline, the Riley opinion does not meaningfully examine the procedure below after implying that additional analysis of specific individualized factors is necessary to justify the rejection of a guideline. Instead, that opinion moves on to a much more extensive analysis of categorical rejection of the 100:1 ratio.

Had the Riley opinion truly concerned itself with procedure and engaged in a further analysis, that analysis would have revealed two important factors which together show a reasonable procedure: First, the district court, at the time it employed the 20-to-1 ratio, had already considered (and acted upon) the § 3553(a) factors. Second, in saying that it "didn't really look at the other § 3553(a) factors because to me it was a moot question," the district court was obviously referring to "other § 3553(a) factors" which might drive the sentence downward, all of which were moot at that time because the sentence (after application of the 20:1 ratio) was already at the statutory minimum and could go no lower.

This court has described proper sentencing procedure as involving three steps: a proper calculation of the guideline range, consideration of the § 3553(a) factors, and proper explanation of the resulting sentence. *Gall v. United States*, 128 S. Ct. 586, 596-597 (2007). Here, the government attacks the second step, as employed in this case. This attack is unwarranted. In pondering the case at the sentencing hearing, the words of the sentencing judge reflect a fair consideration of the § 3553(a) factors. First, the district court affirmatively found that the criminal history was under-represented, a factor described in § 3553(a)(1) ("the history and characteristics of the defendant"). (Tr. at 20; Ex. 4 to Petition) After that point, the court declined at that time to vary for particularized reasons, saying, "I don't think there are other factors under § 3553(a) that in my view justify a variance . . .

I've read the brief and am familiar with the file." (Tr. at 26; Ex. 4 to Petiton) Certainly, this reflects a court that has properly considered the § 3553(a) factors.

Having done so, the sentencing judge (in the portion of the transcript quoted by Judge Riley and relied upon by the government) acknowledged that a further consideration of mitigating § 3553(a) factors is moot, because the court had run up against the statutory minimum simply by employing the 20:1 ratio. (Tr. at 28; Ex. 4 to Petition) Further adjustment through mitigation was not possible. The government believes that this acknowledgement that a floor had been hit somehow creates procedural error, but such a position makes no sense. Here, the district court calculated a guideline range, considered the § 3553(a) factors, and substantiated the sentence chosen. Thus no procedural error occurred. Instead, we are left with the question of the categorical rejection of guidelines, an important issue that this Court should resolve.

II. The Question of Procedure Was Never Before the Eighth Circuit.

The government waived objection to any procedural problems by failing to object at the sentencing hearing and by failing to raise the issue before the Eighth Circuit. At the conclusion of the sentencing hearing, the district court judge asked "is that a good-enough record you think that we've made?" After the defense attorney replied in the affirmative, the judge asked the prosecutor, "Anything else you'd like to add, Mr. Wehde, on this issue?" The prosecutor's response was "No,

your honor." (Tr. at 29; Ex. 4 to Petition) Thus, any procedural error was not properly before the Circuit Court for anything but plain error, and Judge Riley's opinion certainly does not address an occurrence of plain error, a discussion which would be necessary if the decision below turned on a question of procedure.

Second, even if the issue had been preserved, the government never chose to put the question of procedure before the Eighth Circuit. In this case's initial appearance before the Eighth Circuit, the government's cross-appeal challenged "the district court's categorical rejection of the Guidelines' 100:1 powder cocaine to crack cocaine quantity ratio and grant of a downward variance using a 20:1 quantity ratio." *Spears I*, 469 F. 3d at 1170. Before the case was reconsidered by the Eighth Circuit on remand, the government chose not to file additional briefing, and thus waived the issue a second time. (*See* Docket Sheet attached as Exhibit 1) Having chosen not to put the question of procedure before the district court or the Eighth Circuit, the government should not be allowed to do so now.

III. The Judgment is Not Interlocutory.

The judgment of the district court is not interlocutory. After the district court rendered its *final* judgment, the government noticed its cross-appeal. In *Spears I*, the Eighth Circuit *affirmed* the conviction but remanded the case for resentencing -- a posture identical to the current posture in *Spears II*. In response to the petition in *Spears I*, the government argued, as it does here, that the decision

of the district court was interlocutory and thus was not a proper candidate for review.[2] (*See the government's* response in *Spears ISpears I*at p. 5) However, the judgment of the district court was final and appealable. Indeed, the government itself filed an appeal based on the judgment -- an act that would not have been possible had the judgment been interlocutory. *See* 28 U.S.C. § 1291 (courts of appeals have "jurisdiction from appeals from all final decisions"). Further supporting the finality of the judgment, this Court granted Mr. Spears' petition despite the government's insistence that the judgment was interlocutory. And now, the same final judgment is before this Court after again being reversed by the Eighth Circuit. The judgment of the district court was final in *Spears I* and is, likewise, final in this case.[3]

Denying the petition will not promote judicial efficiency or doctrinal clarity. If the case is remanded for resentencing the government will almost certainly insist

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[2] Notably, the government's boilerplate argument ignores recent cases that came before the Court under almost identical circumstances. *See e.g., Claiborne v. United States*, 127 S. Ct. 738 (2006) (granting review of an appeal reversing and remanding a case to the district court for resentencing).

[3] Even if, as the government suggests, the decision below was interlocutory, which it is not, this Court has granted review of interlocutory decisions in criminal cases. *Solorio v. United States*, 483 U.S. 435 (1987); *Bates v. United States*, 522 U.S. 23 (1997). Furthermore, the cases the government cites fall into two distinguishable categories. The first category includes cases seeking review of an appeal from a trial order before final judgment. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *American Constr. Co. v. Jacksonville Ry.*, 148 U.S. 372 (1893). The second category is comprised of a single case where the petitioner sought review of a *vacated* final order. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993).

on a longer sentence for Mr. Spears. If the district court agrees with the government in light of *Spears II*, a duplicate appellate process would begin anew. Moreover, denying this petition will leave the erroneous *Spears II* opinion on the books -- an opinion that improperly applies this Court's precedent and conflicts with the law of other circuits. Thus, contrary to the government's contentions, denying the petition will unnecessarily create confusion and unnecessarily consume judicial resources around the country.

IV. *Spears II* Remains the Law in the Eighth Circuit.

The government cites an Eighth Circuit *panel* opinion, *United States v. Davis*, 538 F.3d 914 (8th Cir. 2008), to imply that the Eighth Circuit has somehow overruled, in part, the erroneous decision in *Spears II*. (Resp. at 14) But *Davis*, a *panel* decision, cannot overrule *Spears II*, an *en banc* decision. *See Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts*, 921 F.2d 775, 779 n.5 (8th Cir. 1990) (noting that a panel opinion cannot even overrule another panel opinion without approval by the en banc court); *Zeneca Ltd. v. Mylan Pharms., Inc.*, 173 F.3d 829, 831 (Fed. Cir. 1999) (observing that multiple federal courts have noted that a panel opinion cannot overrule an en banc opinion). Thus, to the extent there is any conflict between *Davis* and *Spears II*, *Spears II* controls.

Moreover, *Davis* is distinguishable from *Spears II* and any statement in *Davis* that a district court may vary in a "mine run" case is dicta. Indeed, the *Davis*

panel observed that the district court found individualized, case specific facts that mitigated the defendant's sentence -- these findings make *Davis* anything but "mine run." *Davis*, 538 F.3d at 918. The government's response conspicuously omits that the *Davis* panel considered the district court's examination of the other § 3553(a) factors and found that Mr. Davis was admitted to Iowa State University, had the ability to better himself and become a productive member of society, and that pretrial services found him to be cooperative. *Id.* at 918-19. Thus, the question in *Davis*, where the sentence was based, in part, on individualized circumstances, is distinct from the question presented in *Spears II* -- a case where the district court varied based solely on a disagreement with the 100:1 ratio. Thus, beyond the fact that the *Davis* panel opinion could not overrule *Spears II* as a matter of law, the two opinions do not address the same question or occur against a similar factual backdrop.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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